No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

CITY OF INDIANAPOLIS, et al.,
Petitioners and Appellees below,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.,
Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

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TABLE OF CASES.

STATUTES

ABBREVIATIONS

The following abbreviations will be used in the petition for a writ of certiorari and in the brief:

City of Indianapolis, when referred to alone: "City"

City of Indianapolis and the Individual members of the Board of Trustees and Directors, when referred to collectively: "Petitioners"

Chase National Bank of the City of New York, Trustee, when referred to alone: "Chase"

Citizens Gas Company of Indianapolis, when referred to alone: "Citizens Gas"

The Indianapolis Gas Company, when referred to alone: "Indianapolis Gas"

When Chase, Citizens Gas and Indianapolis Gas are referred to collectively: "Respondents"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. .....

CITY OF INDIANAPOLIS, a Municipal Corporation of the State of Indiana, A. DALLAS HITZ, EDWARD W. HARRIS, CHARLES RAUH, MERLE SIDENER, AND THOMAS D. SHEERIN, as Members of the Board of Trustees for Utilities for Said City, and HENRY L. DITHMER, BRODEHURST ELSEY, ROY SAHM, DONALD J. ANGUS ISAAC E. WOODARD, LEROY J. KEACH, AND JOHN E. OHLEAFE, as Members of the Board of Directors for Utilities of Said City.

Petitioners and Appellees below,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee; CITIZENS GAS COMPANY OF INDIANAPOLIS, THE INDIANAPOLIS GAS COMPANY,

Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The City of Indianapolis, a municipal corporation of the State of Indiana, and the members of its Board of

Trustees for Utilities, viz: A. Dallas Hitz, Edward W. Harris, Charles Rauh, Merle Sidener and Thomas A. Sheerin and the members of its Board of Directors for Utilities, viz: Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach and John E. Ohleyer, respectively petitioning show to the Court:

I.

Summary Statement of Matters Involved

A. Nature of the Actions and Decrees Below.

In earlier litigation, the property owned by Citizens Gas was held to be the corpus of a public charitable trust created for the benefit of the gas users of the City.[1]

Todd v. Citizens Gas Co., 46 F. (2d) 855.

This is a suit in equity commenced against petitioners, impleaded with Indianapolis Gas and Citizens Gas by Chase.

Chase, as Trustee (R. 4) under a mortgage to secure bonds executed by Indianapolis Gas (R. 4), sought a decree, the main relief requested being a declaration that a lease for 99 years (R. 5, 6, 21) executed by Indianapolis Gas to Citizens Gas on September 30, 1913, (R. 5) was binding upon and enforceable against the City, as successor trustee of a public charitable trust (R. 20, 21, 22), as a claimed assignee of the lease (R. 16, 17) and allegedly because of estoppel (R. 18, 19) and res adjudicata. (R. 8, 9, 10, 11.)

Chase also sought to obtain an injunction requiring the City to make the payments and perform the covenants con-

[1] A prior attempt to create a public charitable trust had failed because the agreements were held to be insufficient for that purpose. *Consumers Gas Trust Co. v. Quinby*, 137 F. 882.

tained in the lease (R. 21, 306); to obtain judgment for unpaid interest and interest on overdue interest on the bonds (R. 21, 301), together with attorneys' fees and expenses (R. 22).

As relief against Indianapolis Gas, Chase asked that the lease be declared a valid obligation and part of the security which it, as trustee, held for the mortgage bonds of Indianapolis Gas; that pending final hearing Indianapolis Gas be enjoined from attempting to impair the lease; that the court declare Chase's rights as trustee are not altered by the temporary agreement (hereafter referred to) between Indianapolis Gas and the City; that the escrowed moneys (hereafter referred to) be declared the property of the bondholders of Indianapolis Gas; and that Chase have interest on overdue interest, its expenses and attorneys' fees (R. 20-22; 259-260).

The District Court entered a decree that Indianapolis Gas was an indispensable party to the relief sought by Chase and should be realigned with Chase and that when so realigned there was no diversity of citizenship and Chase's bill was dismissed for want of jurisdiction, no federal question being involved (R. 271).

The Circuit Court of Appeals reversed with opinions (R. 285-292, 293) reported in 96 F. (2d) 363. The majority opinion held that although Indianapolis Gas was an indispensable party to the essential question as to whether the lease was binding upon the City (R. 288) and although both Chase and Indianapolis Gas were contending that the lease was enforceable against the City, nevertheless there could be no realignment because on other questions tendered by the complaint there were controversies between Chase and Indianapolis Gas (R. 292).

Petitioners' petition for a rehearing was overruled with-

out opinion (R. 295) and this Court denied certiorari. (305 U. S. 600, 83 L. ed. 381.)

After the case was remanded to the District Court, there was a trial by that court of certain issues on the merits (other issues being reserved for future determination) (R. 321, 322). The District Court made special findings of fact (R. 1160-1190), stated its conclusions of law thereon (R. 1190-1193) and entered a decree that the lease was unenforceable against either City or Citizens Gas (R. 1192, 1193). The District Court entered judgment in favor of Chase against Indianapolis Gas for past due interest but denied interest on overdue interest (R. 1193). The District Court's memorandum opinion is unreported but appears at pages 1122 to 1159 of the record.

Both Chase and Indianapolis Gas appealed to the Circuit Court of Appeals, which reversed the decree of the District Court so far as it held the lease to be unenforceable against the City and in denying interest on interest against Indianapolis Gas and affirmed the District Court in entering judgment in favor of Chase against Indianapolis Gas (R. 1281-1306, 1307, 1308).

The Circuit Court of Appeals held that while Citizens Gas as initial trustee of a public charitable trust had no express power to execute a lease for 99 years that it had the implied power to do so, provided the lease was not burdensome in character (R. 1300).

Petitioners, in their answer to the bill, included a counter claim (R. 182-187) in which they directly and specifically put in issue the burdensome character of the lease and alleged that for that reason, among others, Citizens Gas had no right as initial trustee to execute the lease (R. 186).

On January 18, 1939, pursuant to Rule 42(b) of the Rules of Civil Procedure the District Judge entered the following order *without objection or exception by any party:*

"It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from the Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee *to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust*; reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.

The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (Our emphasis). (R. 321, 322.)

The District Court, in its memorandum opinion, pointed out that only part of the issues in the case had been presented (R. 1159).

Counsel for Chase stated in resting his case that, "Of course, there are other issues which are to be reserved for later trial." (R. 475.)

In the petitioners' petitions for a rehearing (hereafter more specifically referred to), they made the express point that since the District Court had reserved the issue of the burdensome character of the lease, that it was a denial of due process of law to refuse the petitioners the right to be heard on this reserved issue.

We quote the following portion of petitioners' petition for a rehearing addressed to the opinion of the Circuit Court of Appeals as modified:

> "1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by order of the Court entered without objection or exception by any of the parties was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counterclaim and to have the lower Court determine whether when executed this lease was in fact burdensome.*" (R. 1346.)

> "With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.

> "The right to a hearing extends both to a determination of questions of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims

the protection of the Fifth Amendment and the Fourteenth Amendment and each of them." (R. 1346.)

In the petition for a rehearing it is also stated:

> "The Circuit Court of Appeals held that Chase was entitled to a coercive judgment for the unpaid and over-due interest represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:
>
> (1) The City as successor trustee and the trust property.
>
> (2) Citizens Gas.
>
> (3) Indianapolis Gas. (R. 1347, 1348.)"

The Circuit Court of Appeals held that the City was bound by estoppel and res adjudicata by the terms of the lease of September 30, 1913, although admittedly the City never executed the lease (R. 80), was not a party to it; was not named as a party obligated (R. 51-80); was not an assignee (an assignment was tendered and rejected (R. 468)) and no municipal authority having the power to do so ever authorized the execution of the lease, ratified it or agreed to be bound by its terms. (R. 982-986.)

The petitioners filed their petition for a rehearing within the time allowed (R. 1280, 1309) which was denied by the Circuit Court of Appeals without opinion (R. 1336); the Circuit Court of Appeals modified its opinion in unimportant particulars (R. 1335). Petitioners then filed a motion for permission to file a petition for rehearing addressed to the opinion as modified (R. 1340, 1341). The motion was granted (R. 1405). The petition was filed (R. 1341) and denied without an opinion (R. 1405).

All questions here presented were urged on the Circuit Court of Appeals.

II

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, C-229 (43 Stat. 938; 28 U.S.C. Sect. 347). The decree of the Circuit Court of Appeals on the merits was entered, a petition for rehearing was filed within the time allowed by the rules of said court, to-wit: on June 20, 1940, (R. 1280, 1309) and was denied without opinion on July 19, 1940 (R. 1336). On July 19, 1940 the opinion of the Court was modified. A motion for permission to file a petition for rehearing, addressed to the opinion as modified, was filed on August 7, 1940 (R. 1340, 1341). The motion was granted (R. 1405). The petition for rehearing addressed to the opinion as modified filed (R. 1341) and denied (R. 1405). This petition for certiorari was filed before the expiration of three months from July 19, 1940.

III

STATEMENT OF FACTS.

(a) Indianapolis Gas, as lessor, and Citizens Gas, as lessee, entered into a written contract of lease for a term of 99 years (R. 51-80; 55, 77) or for the longest term for which the parties might lawfully contract (R. 80). The lessee was to use and maintain lessor's utility property and to pay as rental the interest upon the lessor's outstanding mortgage indebtedness, being the bonds whereunder Chase is trustee (R. 69-70), also the sum of $120,000 annually for payment to lessor's stockholders as dividends (subject to increase *if the price of gas was decreased*) (R. 70), also certain expenses; in default of which payments the lease was terminable (R. 78).

(b) In 1935 all the property of Citizens Gas, except this lease, was transferred to the city (R. 635) in order to perform the terms of the public charitable trust approved in *Todd v. Citizens Gas Company, et al.*, 46 F. (2d) 855 (C. C. A. 7; certiorari denied 283 U. S. 852).

(c) An assignment of the lease was tendered to the City but was rejected by it (R. 468, 202-204).

(d) The City took temporary possession of the property covered by the lease in order to prevent interruption of service to consumers, without prejudice to its rejection of the lease (R. 200) and Indianapolis Gas consented to such temporary possession and operation without waiving any of its rights (R. 17, 204, 205).

(e) The City and Indianapolis Gas then entered into a separate agreement, distinct from the lease, by the terms of which the City was to continue such temporary operation and meanwhile pay into a bank, to be held in escrow, sums equal to the amounts specified in the lease, as compensation for such temporary use of Indianapolis Gas property, until further arrangements could be made, or until the present controversy was finally adjusted or terminated by a decree of court; all without prejudice to the position taken by each party as to the binding effect of the lease on the city (R. 19, 205-208, 257, 261). Payments were accordingly made to and are held by the escrow (R. 258-260, 638).

(f) Chase claimed in its complaint (R. 3-22) that the City was estopped to deny the validity of the 99 year lease by reason of the following:

> (1) Findings and orders of the Indiana Public Service Commission on an intervening petition of one Frank S. Fishback (R. 8, 9, 18).

(2) Sale of Indianapolis Gas bonds by Citizens Gas (R. 11, 12).

(3) "The City of Indianapolis and the residents and inhabitants thereof have had the full benefit and advantage of such operations, and of the profits produced thereby and of the protection thus given to the public charitable purposes to which the property of the Citizens Gas Company of Indianapolis were dedicated." (R. 12.)

(4) Sale of revenue bonds and alleged representations made by the City (R. 14, 15).

(5) Claimed assignment by Citizens Gas to the City of the 99 year lease.

(6) The following decisions:

Fishback v. Public Service Commission, 193 Ind. 282 (R. 10, 18);
Todd v. Citizens Gas Company, 46 F. (2d) 855 (R. 13, 18);
Williams v. Citizens Gas, 206 Ind. 448 (R. 14, 18).

Chase also claimed that the foregoing decisions were res adjudicata of the question of the enforceability of the 99 year lease against the City (R. 8, 10, 13, 14).

IV

The Questions Presented.

Upon the record and the opinion of the Circuit Court of Appeals, three important Federal questions are presented.

First. Whether the decision of the Circuit Court of Appeals denies to the City due process of law as guaranteed by (a) the Fifth Amendment to the Constitution of the United States; and (b) the Fourteenth Amendment to the Constitution of the United States, in this:

The District Court, by an order entered without objection or exception by any party (the relevant parts of which are set out at page 5 of this petition), reserved for future determination the question of the burdensome character of the lease of September 30, 1913 (R. 321, 322). The Circuit Court of Appeals held (R. 1300) that if the lease were in fact burdensome Citizens Gas, as initial trustee, had no authority to execute the same, but held, without any trial in the lower court, that a certain order (non-judicial in character) of the Public Service Commission of Indiana and a judgment of the Supreme Court of Indiana were res adjudicata.[2]

The City was thus denied a hearing in a trial court on the issue of the burdensome character of the lease. The right to such a hearing by the trial court extends both to a determination of the law and the facts.

Second. The Circuit Court of Appeals held for the first time in its opinion of June 6, 1940, that Chase was entitled to a coercive judgment enforceable in the following order:

(1) Against the City as Successor Trustee and the trust property.

(2) Against Citizens Gas.

(3) Against Indianapolis Gas.

The evidence shows that from the funds deposited in escrow (R. 638) and the funds arising from the operation of the property (R. 542, 543) the City will be required and is abundantly able to pay the entire judgment and that Indianapolis Gas has thus been insulated from liability.

The result of the decision is that a judgment has been ordered entered which is equally beneficial to Chase and

[2] *Williams v. Citizens Gas Co.*, 206 Ind. 448.

Indianapolis Gas and which amounts in effect *not to judgment against Indianapolis Gas but one in its favor.*

The decision of the Circuit Court of Appeals is directly in conflict with controlling decisions of this Court to the effect that parties must be realigned in accordance with their relation to the *main controversy* in the case and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain jurisdiction on the ground of diversity of citizenship, viz:

Sutton v. English, 246 U. S. 199, 62 L. ed. 664;
City of Dawson v. Columbia Trust Co., 197 U. S. 178, 49 L. ed. 713.

An examination of the record will show that Chase and Indianapolis Gas are friends attempting to assert hostility only for the purpose of conferring a jurisdiction which would otherwise not exist.

Third. The Circuit Court of Appeals wholly disregarded the applicable Indiana law in four important particulars and thus violated the rule established by this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 as follows:

1. It impliedly held that the City was bound by the ... se by the doctrine of estoppel, although admittedly there was no effort to prove that any present bondholder of Indianapolis Gas knew of any of the acts asserted as the basis of such estoppel, much less relied upon the same, and under a long line of Indiana cases the unauthorized act of a City official cannot be made the basis of an estoppel.

2. It applied the doctrine of res adjudicata to a decision of the Public Service Commission, to a case in which the City had been dismissed as a party before final judgment, to a case in which Indianapolis Gas and Chase were not

parties and to a case in which Indianapolis Gas, a predecessor trustee of Chase and City were defendants and in which neither of said defendants had tendered any issue against the other, although the City had directed the attention of the Court to the fact that whether the lease was valid or invalid was immaterial.

3. It held a municipal corporation liable (presumably out of revenues raised from taxation) for future payments of more than $45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same although the Indiana law is that all powers granted by a municipal corporation must be strictly construed against the grantee and that nothing passes by implication. Among other things, the holding, in effect, guarantees to the stockholders of Indianapolis Gas 6% interest on their stock for approximately 77 years in the future or until 2013.

4. Sections 85 and 254 of the Acts of the Indiana General Assembly of 1905 expressly prohibit any such lease for more than 25 years and prohibit its execution without municipal sanction. The Indiana cases hold that any agreement made in violation of these sections is void ab initio and cannot be ratified. The Circuit Court of Appeals held the lease valid for its full term of 99 years, although the lease had no municipal sanction of any kind.

B

Reasons Relied Upon for Allowance of Writ.

The Circuit Court of Appeals for the Seventh Circuit has decided three Federal questions in a manner in conflict with the applicable decisions of this court, towit:

First. It has denied the City a hearing and trial on the question of the burdensome character of the lease of September 30, 1913. The City was entitled to a trial in the District Court on all questions of *fact and law*. Without

such hearing the requirements of due process are not satisfied.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 81 L. ed. 1093;
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107.

(a) An attempt by an appellate tribunal to determine the question of res adjudicata does not satisfy the requirements of due process.

(b) The City was entitled to be heard in the trial court on both the questions of law and fact as to whether the order of the Public Service Commission of Indiana approving the lease and the Williams case (206 Ind. 448) were res adjudicata and whether the lease was in fact burdensome. To refuse such a hearing is to deny due process of law.

Ohio Water Works Co. v. Ben Avon Borough, 253 U. S. 287, 64 L. ed. 908, 914.

Requirements of due process are satisfied only by a hearing in the trial court.

Second. The Circuit Court of Appeals has decided that in determining the existence of federal jurisdiction, where that jurisdiction is wholly dependent on diversity of citizenship, it is not the duty of the court to realign the parties in accordance with their interests in the dominant controversy where more than one controversy or issue is tendered, unless they are also in accord upon all other and minor issues; a decision which conflicts with the ruling of this Court in *Sutton v. English*, 246 U. S. 199, 62 L. ed. 664.

Third. The Circuit Court of Appeals disregarded the rule laid down by this Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that:

1. It refused to follow the Indiana decisions set out below on estoppel of a City.

Ross, et al. v. Banta, 140 Ind. 120, 150;

Union School Twp. v. First National Bank, 102 Ind. 464, 476;

Hosford v. Johnson, et al., 74 Ind. 479, 485;

Platter v. Board, 103 Ind. 360, 381.

2. It refused to follow the Indiana decisions on the question of res adjudicata, viz:

Jones v. Vert, et al., 121 Ind. 140, 141;

Maple v. Beach, 43 Ind. 51, 59;

Kitts v. Wilson, 140 Ind. 604, 610.

3. It refused to follow the rule of the Indiana decision set out below that a grant made by a municipality is to be taken most strongly against the grantee and nothing is to be taken by implication against the public and enforced a lease against the City where the right to execute such a lease was based solely on implied power of the initial trustee to execute the same.

Indianapolis Cable R. R. Co. v. Citizens Street R. R. Co., 127 Ind. 369, 390.

And it likewise refused to follow the same rule laid down by this Court in the following cases:

Piedmont Power & Light Co. v. Town of Graham, et al., 253 U. S. 193, 64 L. ed. 855;

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 355;

Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801;

Mitchell v. Dakota Central Telephone Co., 246 U. S. 396, 62 L. ed. 793.

4. It refused to follow the Indiana decisions that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes.

Gas, Light, etc. Co. v. City of New Albany, 156 Ind. 406, 415;

City of Indianapolis v. Wann, Receiver, 144 Ind. 175, 187.

The Indiana cases cited above to propositions 1, 2, 3, and 4 are the law of Indiana. There are no Indiana decisions to the contrary. There was thus an *arbitrary refusal* to follow the applicable Indiana law, in violation of the rule established by this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

Fourth. An important public question is involved, viz: whether a municipal corporation shall have imposed upon it an obligation for 77 years in the future aggregating more than $45,000,000 in amount under a lease without any municipal sanction, where the Court does not limit the payments of the obligation to the revenues arising from the operation of the plant, but presumably imposes the burden on revenues raised by taxation.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7143, *The Chase National Bank of the City of New York, Trustee, etc. v. Citizens Gas Company of Indianapolis, et al.*, and that the decree of said United States Circuit Court of

Appeals in said cause be reversed by this Court, and that petitioners have such other and further relief in the premises as to this Court may seem just.

WILLIAM H. THOMPSON,
Counsel for Petitioner.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Of Counsel.

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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al.
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No. .....

BRIEF IN SUPPORT OF PETITION FOR A WRIT OR CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

The District Court neither gave nor filed a written opinion in dismissing the bill of complaint for want of jurisdiction (R. 271).

The majority opinion of the Circuit Court of Appeals for the Seventh Circuit (filed April 8, 1938) reversing the District Court on the jurisdictional question appears at pages 285 to 292 of the record and is reported in 96 F. 2d at pages 363 and following. The dissenting opinion of Judge Treanor appears in the record at page 293 and is reported in 96 F. 2d. at page 368.

Petitioners' petition for Writ of Certiorari was denied 305 U. S. 600, 83 L. ed. 381.

The memorandum opinion of the District Court on the merits, filed September 21, 1939, is unreported, but appears

at pages 1122 to 1159 of the record. The decree of the District Court is to be found at pages 1192 and 1193 of the record.

The opinion of the Circuit Court of Appeals, filed June 6, 1940, appears at pages 1281 to 1306 of the record and is as yet unreported. The opinion was amended on July 19, 1940 (R. 1335).

No opinion of the Circuit Court of Appeals was filed in overruling petitioners' petition for a rehearing or in overruling petitioners' second petition for a rehearing addressed to the opinion of the Circuit Court of Appeals as modified (R. 1335, 1405).

II

JURISDICTION

A statement particularly disclosing the basis upon which it is contended that this court has jurisdiction is set out in the petition for the Writ of Certiorari at page 8.

III

STATEMENT OF THE CASE

A full statement of the case having been given in the petition for certiorari for brevity is not here repeated.

IV

ASSIGNMENTS OF ERROR

The Circuit Court of Appeals erred in each of the following particulars:

1. In directing the entry of a judgment against the City, when the City had not had its day in court on the

question of the burdensome character of the lease of September 30, 1913. This was a denial of due process of law in violation of the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States.

The requirements of due process are not satisfied unless a party has the right in a trial court to a determination of all issues of fact and law. This requirement has been denied the City.

2. In holding that defendant Indianapolis Gas should not be realigned as a party plaintiff for the reason that Chase and Indianapolis Gas were in accord on the principal controversy, against petitioners, although Chase and Indianapolis Gas (but not the City) were adverse in attitude on other and minor issues.

3. In holding that the attitude of the parties on minor or subsidiary issues prevents their realignment on the major and substantial issue, in order to test the jurisdiction of the court.

4. In refusing to follow the rule announced by this court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 in that the Circuit Court of Appeals refused to follow the controlling Indiana decisions on (a) the questions of estoppel of a municipal corporation, (b) the doctrine of res adjudicata, (c) the question of the denial of all powers granted by a municipal corporation except those expressly granted and (d) the question of the violation of Sections 85 and 254 of the acts of the Indiana General Assembly of 1905 prohibiting the execution of any such lease as that here involved for a longer period than 25 years and even for such a period without proper municipal sanction.

V

ARGUMENT

A. Complete jurisdiction in the Supreme Court of the United States is shown by the record since this is a civil case in the United States Circuit Court of Appeals for the Seventh Circuit. The petitioners were parties to such case. (R. 1280) Judicial Code Section 240 (a), amended February 13, 1925. C. 229, 43 Stat. 938, 28 U. S. C. A. 347.

B. The Circuit Court of Appeals has denied the City a hearing and trial on the question of the burdensome character of the lease of September 30, 1913, a trial to which the City was entitled in the District Court on all questions of fact and law. Without this hearing the requirements of due process of law are not satisfied.

The question of the burdensomeness of the lease was put in issue by the counter-claim of the City (R. 186).

On January 18, 1939, the District Court without objection or exception by any party, entered an order reserving the issue of the burdensome character of the lease for future trial (R. 321, 322). (The relevant portions of the order are set out on page 5 of the petition for writ of certiorari.)

On March 2, 1939, a trial was commenced (R. 323) on the issues which by the order of January 18, 1939 (R. 321) were to be tried. The District Court on September 21, 1939, filed its written memorandum (R. 1122).

The next to the concluding paragraph of the memorandum recited that:

> "Under the issues presented at this time for determination, the plaintiff is entitled to no money judgment against the City." (R. 1159.)

The Court's Conclusion of law No. 10 recited:

> "That the plaintiff should take nothing in this action as against the defendant, City of Indianapolis, under the issues presented at this time for determination." (R. 1192.)

An appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit (R. 1194) and on June 6, 1940, the Circuit Court rendered an opinion (R. 1281-1306) which was subsequently modified on July 19, 1940. (R. 1335.)

Among other things, the Circuit Court decided that:

> "In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams v. Citizens Gas, et al.*, 206 Ind. 448, 458, 460." (R. 1300.)

The same Court also decided that:

> "Our conclusions in this case follow: (1) the 99 years lease is valid; (2) the assignment of the lease did not relieve Citizens Gas from its obligations as lessee; (3) the indemnity contract is effective; (4) the lease binds the City as successor trustee and the trust property; (5) the leasehold interest is part of the trust *res*; (6) the City has accepted the trust *res*; (7) Chase has a right to interest;

> (8) Chase has a right to interest on interest; and (9) Chase is entitled to interest at the rate of 5%." (R. 1306.)

It is clear that the issue of burdensomeness on which the City has had no opportunity to be heard, either on the questions of fact or law, and which was expressly reserved by the trial court (R. 321), was decided against the City by the Circuit Court of Appeals.

The petitioners pleaded in their answer specifically the reasons why the several decisions relied upon by plaintiffs were not res adjudicata. (R. 141-187, 149, 150, 151, 152, 153, 159, 160, 172, 173.) Whether the cases relied upon by plaintiff were res adjudicata of the burdensomeness of the lease, was a mixed question of law and fact, and petitioners were entitled to a trial and findings by the Court (Rule 52, Rules of Civil Procedure for the District Courts of the United States) upon which the District Court's decision could be reviewed. No hearing was had on the issue of burdensomeness and no findings were made, and for the reason, as pointed out, that the issue was expressly reserved for future trial.

Due process of law means notice and an opportunity to be heard. In the instant case the requirements of due process are satisfied only by a hearing in the trial court.

In *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 221, it was said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an

> enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

In *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 U. S. 292, 304-306, 81 L. ed. 1093, 1102, it was said:

> "The right to such a hearing is one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In *Ohio Water Works v. Ben Avon Borough*, 253 U. S. 287, 289, 64 L. ed. 908, 914, this Court had before it the complaint of the Water Company that it was denied the right to a hearing.

Mr. Justice McReynolds, speaking for the Court, said that:

> "In all such cases, if the owner claims confiscation of his property will result, *the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment* * * *.

> Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state * * * the challenged order is invalid." (Our emphasis.)

The prohibitions of the 5th Amendment to the United States Constitution are measured by the settled scope of the 14th Amendment. This Court has said:

> "that the legal import of the phrase 'due process of law' is the same in both amendments."
>
> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 329, 45 L. ed. 879, 884.

In *Twining v. New Jersey*, 211 U. S. 78, 101, 53 L. ed. 97, 107, it was pointed out that:

> "If any different meaning of the same words as they are used in the 14th Amendment (and in the 5th Amendment) can be conceived, none has as yet appeared in a judicial decision."

To hold that the 99 year lease is valid and binding on the City as trustee, and on the trust property, and thereby to impose upon the City by the Court's decision a liability of $45,000,000, and to hold that the lease is enforceable against the City as successor trustee and the trust property, when the question of the burdensome character of such lease was expressly reserved without objection or exception by any party (R. 321), and the City has had no opportunity to be heard, either on the law or on the facts of this issue, is a denial of due process of law which is guaranteed to all by the 5th Amendment, and by the 14th Amendment.

The denial of due process in this case is a question of gravity and importance. If such power exists in the Circuit Court of Appeals, then the judicial department of the Government which sits to uphold and enforce the Constitution, is the only department possessing the power to deny a hearing to litigants. If such authority exists in the Courts, then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent. Judicial proceedings cannot be valid unless they proceed upon inquiry and render judgment only after trial. In the instant case there was no inquiry; there was no trial, on the reserved issue of burdensomeness.

An appeal to an appellate tribunal is a matter of grace.

Cobbledick v. U. S., 309 U. S. 323, 84 L. ed. 524.

A hearing in the trial court is a matter of right, the denial of which is prohibited by the 5th and 14th Amendments.

The hearing guaranteed by the due process clauses cannot be in an appellate tribunal.

It is a fundamental rule that in judicial proceedings affecting rights there shall be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established.

Kuntz v. Sumption, Treasu. r, 117 Ind. 1, 5.

C. The Circuit Court of Appeals has decided that in determining the existence of Federal jurisdiction where dependent upon diversity of citizenship, parties need not be realigned in accordance with their interests in the dominant controversy, and before such realignment can occur, must be in accord upon all other and minor issues.

The Court held that Indianapolis Gas was an indispensable party to the controversy. (R. 288.) It then said:

> "The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon all issues presented * * *. It is not sufficient that they merely be in accord upon one issue or some of the issues." (R. 291.)
>
> (*Chase National Bank, etc., et al., v. Citizens Gas, et al.*, 96 F. 2d. 363, 366, 367; certiorari denied: 305 U. S. 600, 83 L. ed. 381.)

This is a Federal question decided in a way probably in conflict with prior decisions of this Court, viz: *Sutton v. English*, 246 U. S. 199, 62 L. ed. 644; *City of Dawson, etc. v. Trust Co.*, 197 U. S. 178, 49 L. ed. 713.

For the first time the Circuit Court of Appeals in its opinion of June 6, 1940, as modified, held that Chase was entitled to a coercive judgment enforceable in the following order:

1. Against the City as successor trustee and the trust property; 2. Against Citizens Gas; 3. Against Indianapolis Gas.

The evidence shows that as of December 31, 1938, the City had deposited with an escrow pursuant to an agreement (R. 205-207) the sum of $1,217,875 derived from the proceeds of the City's operation of the property transferred to it by Citizens Gas, and the property of the Indianapolis Gas covered by the lease with Citizens Gas (R. 638). Each month subsequent to December 31st amounts have been accrued in the escrowed fund. (R. 473, 474). From the fund in escrow and from the funds arising from the operation of the property (R. 542, 543), the City will

be required to and is abundantly able to pay the entire judgment and Indianapolis Gas will be wholly insulated from any liability.

The result of the decision of the Circuit Court of Appeals is that a judgment has been ordered entered which is equally beneficial to Chase and to Indianapolis Gas, and which amounts in substance *not to a judgment against Indianapolis Gas but one in its favor.*

The actual position taken on the record by Chase and Indianapolis Gas is that Chase asserts that the lease is a binding obligation against the City (R. 3, 20, 21). Indianapolis Gas also asserts the lease is binding upon the City. (R. 137, 138, 215, 219.)

The attitude of the respective parties toward the actual and substantial controversy should determine whether realignment shall take place for the purpose of testing the jurisdiction of the Court as the Federal Court; irrespective of the attitude of the parties towards subsidiary or different issues.

In *Sutton v. English*, 246 U. S. 199, 204, this Court said that:

> "It will be apparent that the Court below erred in holding, as it did, that the defendant Cora D. Spencer, should be treated as one of the plaintiffs and aligned with them for the purpose of determining the question of diversity of citizenship. Provided plaintiffs attained their first three objects, her interest would be the same as theirs with respect to the prayer for partition; but before this result could be reached, plaintiffs must prevail as to their third object, and with respect to this her interest was altogether adverse to theirs. *Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy.*" (Our emphasis.)

In the Sutton case the attitude of the parties toward the actual and substantial controversy was determinative as to whether or not there should be a realignment. Had the Circuit Court of Appeals followed that rule in the instant case, it would have held that both plaintiff Chase and defendant Indianapolis Gas in their attitudes towards the actual and substantial controversy were identical, and would have ordered Indianapolis Gas realigned with Chase as a plaintiff, thus destroying diversity of citizenship, the sole basis upon which jurisdiction was predicated. (R. 3.)

D. The Circuit Court of Appeals disregarded the rule laid down by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188:

> 1. In refusing to follow the Indiana decisions, of which counsel have found none to the contrary, that hold:
>
> *First*, that the doctrine of estoppel has no application where the other party was not influenced by the acts pleaded as an estoppel. *Ross et al. v. Banta*, 140 Ind. 120, 150; *Hosford v. Johnson et al.*, 74 Ind. 479, 485.
>
> There is no proof in the record that any present bondholder of Indianapolis gas bonds knew of, relied on or was influenced by any acts of the City. (R. 340, 344, 355, 357, 361, 362, 397, 568, 584-589.)
>
> *Second*, an estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority. The record shows that no corporate body possessed of the requisite power ever authorized the execution of the lease or ratification of it by the City. (R. 982, 983, 984, 985-986.)

2. In refusing to follow the Indiana decisions on the question of res adjudicata which announce the rule to be that no party may invoke the doctrine of former adjudication unless he has tendered to the party against whom the doctrine is invoked "an issue to which the latter could have demurred or pleaded." *Maple et al. v. Beach*, 43 Ind. 51, 58; *Jones v. Vert, et al.*, 121 Ind. 140, 141; *Kitts v. Wilson*, 140 Ind. 604, 610. (Compare *Pepper v. Litton*, 308 U. S. 295, 84 L. ed. 160, 165.)

3. In refusing to follow the Indiana rule laid down in *Indianapolis Cable R. R. Co. v. Citizens Street R. R. Co.*, 127 Ind. 369, 390, which is to the effect that a grant of right or privilege by a municipality is strictly construed against the grantee, and that whatever is not unequivocably granted is withheld—nothing passes by implication. In *Piedmont Power & Light Co. v. Town of Graham et al.* 253 U. S. 193, 194, 195 this court said:

"Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocably granted is withheld.—nothing posses by implication." (Compare *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 355; *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801; *Mitchell v. Dakota Central Telephone Co.* 246 U. S. 396, 62 L. ed. 793.)

The Court recognized in its opinion that the grant to the trustee gave no express power, for it said:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property." (R. 1297.)

The lease has thus been held enforceable solely because of implied power of the initial trustee.

4. In refusing to follow the Indiana decisions which hold that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes. *Gas Light & etc. Co. v. City of New Albany*, 156 Ind. 406, 415; *City of Indianapolis v. Wann*, Receiver, 144 Ind. 175, 187.

Two Indiana statutes prohibit the making of the lease in question by the City. (Text of these two statutes is set out in the appendix.)

The Indiana decisions set out above under 1, 2, 3 and 4 are the law of Indiana. There are none to the contrary. In refusing to abide by those decisions the Circuit Court of Appeals arbitrarily refused to follow the applicable Indiana law in violation of the rules established by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64.

E. An important public question is here involved. It is whether a municipal corporation shall have imposed upon it an obligation for 77 years in the future aggregating more than $45,000,000 in amount, under a lease *for which there was no municipal sanction*, where the Court does not limit the payments of the obligation to the revenues arising from the operation of the plant, but presumably imposes the burden on revenues raised by taxation.

Wherefore, petitioners pray that the writ be granted.

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September 9, 1940

APPENDIX

Section 85 of Chapter 129 of the Acts of the Indiana General Assembly 1905, page 271 (48-1507 Burns' Indiana Statutes Annotated, 1933):

> "No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302, Burns') of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance."

Section 254 of Chapter 129 of the Acts of 1905, page 396 (48-7302 Burns' Indiana Statutes Annotated, 1933):

> "Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water,

motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants; Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further. That before any such contract shall be made by any city of the first, second, third, or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."